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Conference

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

4 Plaintiff,

5 v.

08 CV 01511 (RJS)

6 THE PAINTING KNOWN AS  
7 "HANNIBAL", et al.,

8 Defendants.

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9  
10 April 23, 2012  
10:35 a.m.

11 Before:

12 HON. RICHARD J. SULLIVAN,

13 District Judge

14 APPEARANCES

15 PREET BHARARA

16 United States Attorney for the  
Southern District of New York  
Attorneys for Plaintiff

17 BY: JASON P. HERNANDEZ  
Assistant United States Attorney

18 NESENOFF & MILTENBERG, LLP

19 Attorneys for Defendant Broadening-Info Enterprises, Inc.  
20 BY: PHILIP A. BYLER

21 JOSEPH H. LILLY, III

Attorney for the Trustee for Banco Santos

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1 THE DEPUTY CLERK: All rise.

2 THE COURT: Okay, have a seat.

3 (Case called)

4 MR. HERNANDEZ: Good morning, your Honor, Jason  
5 Hernandez for the United States.

6 THE COURT: Okay, Mr. Hernandez, good morning.

7 MR. BYLER: Good for the claimant Broadening, Phil  
8 Byler.

9 THE COURT: Okay, Mr. Byler, good morning to you.

10 MR. BYLER: Good morning.

11 THE COURT: For the --

12 MR. LILLY: For the Trustee of Banco Santos, Joseph  
13 Lilly.

14 THE COURT: All right, Mr. Lilly, I got your request  
15 to substitute counsel.

16 MR. LILLY: Thank you.

17 THE COURT: And I've signed that, so that will get  
18 docketed.

19 MR. LILLY: I appreciate that. Thank you, sir.

20 THE COURT: Today I'm not sure what we're going to  
21 need from you going forward.

22 MR. LILLY: Yeah.

23 THE COURT: This was a case that I guess I issued an  
24 opinion in back in May of 2010. It then went up on appeal, and  
25 the Court of Appeals affirmed me on everything that I felt was

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1 contested, but remanded for the sole purpose of determining  
2 whether or not the second element of the cause of action has  
3 been met; and, that is, whether the merchandise was stolen,  
4 smuggled or clandestinely imported or introduced.

5 It seems to me pretty clear that the evidence that  
6 would establish this as contrary to law would also establish  
7 that the paintings in question were clandestinely imported or  
8 introduced, but maybe I'm missing something.

9 So, tell me.

10 MR. BYLER: No. Broadening does not agree with that.

11 THE COURT: All right.

12 MR. BYLER: We believe that, assuming you have a  
13 violation of 18 U.S.C. Section 542, that that does not  
14 automatically mean you have the prerequisites for forfeiture  
15 under 19 U.S.C. Section 1595. This, remember, was on summary  
16 judgment.

17 THE COURT: Right.

18 MR. BYLER: And with respect to the other part of the  
19 case, it was after the Second Circuit had ruled in Davis. So a  
20 lot of the focus on the case on CAFRA, well, became academic.

21 THE COURT: Right.

22 MR. BYLER: And what troubled the Appellate Court was,  
23 well, wait a minute, does there be a -- is there a ground for  
24 forfeiture under 19 U.S.C. 1595 on this record, you know, based  
25 on what the government showed would be a violation of 18 U.S.C.

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1 542.

2 Our position was that this was not clandestinely  
3 imported, it was not smuggled, and that's what we believe on  
4 summary judgment the record showed. And that's what we believe  
5 requires that if the Government's going to pursue forfeiture  
6 under 1595, it will need, as it did in Davis, by the way, a  
7 trial. And that's our position. We believe that the precedent  
8 doesn't support looking at 542 and, therefore, you meet 1595.

9 THE COURT: I don't think you automatically meet it.  
10 I think the issue is on these facts, do you. And what I found,  
11 and what I don't think is in dispute, is that the shipments  
12 were valued at less than \$2,000, right, and that the actual  
13 value of the paintings was north of, you know, a million  
14 dollars probably, right?

15 MR. BYLER: Well, on the alleged statement by the  
16 government. However, these were not clandestinely imported.  
17 They were openly advertised. This record had other elements to  
18 it in terms of the importation. There was no disguise on the  
19 part of Broadening in terms of what was it doing in terms of  
20 bringing the items into the United States. And that's why the  
21 Appellate Court stopped and said, well, wait a minute, on this  
22 record, it's not clear that we have a basis for summary  
23 judgment. I underscore the word summary judgment, for  
24 forfeiture. Our position is if you establish something under  
25 18 U.S.C. 542, and this was something was picked up by the

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1 Appellate Court and noted by an appellate judge, that you would  
2 have a fine, you would have a penalty, but it wouldn't be  
3 forfeiture.

4 THE COURT: No, I get all that. I read the opinion.  
5 I've read the opinion. The issue is whether or not there are  
6 factual disputes or whether the record is established now such  
7 that summary judgment can be granted with respect to the  
8 remaining element. You're saying, your position is no.

9 MR. BYLER: No, summary judgment cannot be granted  
10 properly, and that you need a trial as you did in Davis.

11 THE COURT: I get that. If the summary judgment is  
12 not proper, you need a trial, I get that.

13 Let me hear from the government.

14 MR. BYLER: Sure.

15 MR. HERNANDEZ: Judge, I think that you've described  
16 the issue why we're here accurately.

17 I think, though, that the facts that are necessary for  
18 you to make the finding that the Hannibal and Togatus were  
19 clandestinely imported or smuggled are well established. Your  
20 Honor hit on one of them, which is that Hannibal, which is  
21 valued at \$8 million, was imported at a claim of \$100.

22 THE COURT: Well, it's even worse than that. The  
23 claimant paid a million dollars.

24 MR. HERNANDEZ: Right. Claimant paid over a million I  
25 think, and it was valued at over eight million by an appraiser.

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1 THE COURT: Right.

2 MR. HERNANDEZ: And it was declared as \$100.

3 THE COURT: Yes.

4 MR. HERNANDEZ: In addition to that, there was also --  
5 the painting itself was not described by its proper title --

6 THE COURT: Yes.

7 MR. HERNANDEZ: -- or by the artist, all those  
8 different facts.

9 THE COURT: Yeah, no, look, that's what it seems to  
10 me.

11 I mean, on the other hand, if that were so obvious  
12 then, I'm not sure why the Second Circuit is sending it back.  
13 I mean, they would be in the same position as I to say, h'mm,  
14 given those facts, you've met the second element.

15 MR. HERNANDEZ: Well, Judge, we can -- I think we can  
16 really only go off of their opinion. And what their opinion  
17 says is that, you know, we reviewed Judge Sullivan's order  
18 granting summary judgment and he doesn't address this head on.

19 At oral argument the government made the same point  
20 that you're making, which is that once Judge Sullivan made all  
21 these other findings, it kind of intellectually follows that  
22 this is clandestinely imported and smuggled. And from my  
23 recollection, Judge Katzmann was, in particular, very skeptical  
24 of the argument that these items were not smuggled or  
25 clandestinely introduced based on some precedent that he had

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1 cited. But I think that panel felt that for them to properly  
2 review the summary judgment order, they wanted some specific  
3 findings from your Honor. And we addressed this in our,  
4 primarily, in our reply brief on summary judgment. We provided  
5 a number of different cases from different circuits that showed  
6 that when you bring something in by fraud, when you  
7 misrepresent what it is, that that meets the definition of  
8 smuggling and clandestinely introduced.

9 So our position would be that, based on the facts that  
10 you already found, and that the Circuit has already affirmed  
11 on, what remains is to make the legal connection, which is that  
12 based on these facts you have -- the government has met its  
13 burden for summary judgment, that this is smuggling and  
14 clandestinely introducing goods, and that portion of the  
15 statute's met.

16 THE COURT: All right. Well, so what do you propose  
17 we do going forward, and I'll ask Mr. Byler the same question?

18 MR. HERNANDEZ: Your Honor, I think that this issue  
19 was briefed, and I think that it's presented for the Court. It  
20 was presented for the Court, so you could make the decision  
21 based on the briefs that are already before the Court. But the  
22 government would be happy to provide whatever supplement, if  
23 your Honor deems necessary, or come for argument where we're  
24 willing to take, of course, whatever direction the Court wants.  
25 But I don't think it's necessary that we have additional

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1 briefing or argument.

2 THE COURT: All right. And --

3 MR. BYLER: Okay. Oh, I'm sorry.

4 THE COURT: Go ahead.

5 MR. BYLER: Oh.

6 THE COURT: Yes.

7 MR. BYLER: Thank you, your Honor.

8 Our position is that at this point we should have some  
9 additional briefing.

10 THE COURT: We should or should not?

11 MR. BYLER: Should.

12 THE COURT: Should.

13 MR. BYLER: This issue was briefed below you -- before  
14 you. It was briefed before the Appellate Court. So it wasn't  
15 as if the different positions of the government and Broadening  
16 weren't before the Appellate Court with respect to this issue.  
17 They were. And the Appellate Division -- excuse me -- the  
18 Appellate Court, Second Circuit obviously felt that it could  
19 not proceed without specific findings.

20 I understand what you're saying. However, I think  
21 there's other elements for the record. And I think before we  
22 have to deal with what would be an appeal, if you just  
23 proceeded at this point and followed what your first instinct  
24 is, that we should do I think a lawyerly and judicial thing is,  
25 wait a minute, let's have briefing and let's focus on the

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1 issue, with all due respect, so that the record is very clear  
2 and the reasoning is very clear as to, you know, whether there  
3 is or not a basis to order forfeiture under 1595. That's  
4 what's at issue.

5 As I, you know, indicated before, we don't think it  
6 could be done on summary judgment, given this record.

7 THE COURT: Okay. But you're saying you'd like  
8 another crack at briefing.

9 MR. BYLER: Yeah. And reason is that while you can  
10 point to this fact or that fact and tie together a rationale,  
11 remember on summary judgment you have a larger record. And  
12 summary judgment isn't decided on the ground that, well, you  
13 can have a rationale for deciding one way. No. It is whether  
14 there are any material issues of fact. That's a different  
15 question. One can argue that at trial the position you took  
16 might convince a jury. But on summary judgment, a judicial  
17 decision, the question is whether on the whole record there are  
18 material issues in fact. And with all due respect, your Honor,  
19 that is what Broadening believes, and that's why we think it's  
20 important at this point to have some brief, at least some  
21 briefing on that issue.

22 THE COURT: But what are the issues of fact?

23 MR. BYLER: Whether or not what was done here on the  
24 whole record was something that satisfied --

25 THE COURT: No, that's not an issue of fact.

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1 MR. BYLER: No.

2 THE COURT: You're restating what the issue of law is.  
3 But what are the issues of fact?

4 MR. BYLER: But we had a fall record.

5 THE COURT: So tell me what are the issues of fact.

6 MR. BYLER: An affidavit of Mr. Carnegie. Basically  
7 the point was, here, this is what happened. By the way, we,  
8 Broadening, weren't responsible for the specific importation,  
9 but this is what happened. There was no effort to conceal.  
10 There was no effort to smuggle. We advertised publicly these  
11 items in the United States at the time that we were bringing  
12 these items into the United States.

13 Given what's in the record, particularly  
14 Mr. Carnegie's affidavit, that you cannot, we believe, conclude  
15 that you satisfy the elements of 1595 that there was not  
16 clandestine importation. There was certainly not smuggling.  
17 And the case law, which, you know, Government and Broadening  
18 did argue about in the briefs and before the court, doesn't get  
19 you to the point of a 1595 violation based solely on a 1542  
20 violation.

21 THE COURT: But it sounds to me like there's no  
22 dispute as to facts. It sounds to me there's a dispute as to  
23 the conclusions to be drawn from those facts. But what facts  
24 are you alleging that Mr --

25 MR. BYLER: I think I just alluded to them. No, I

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1 don't agree with that assessment of the record.

2 THE COURT: Mr. Hernandez --

3 MR. BYLER: I mean what you're describing, no, I  
4 don't. I'm sorry, your Honor I --

5 THE COURT: So what are the facts that are in dispute,  
6 not the conclusions, the facts?

7 MR. BYLER: No, I understand. As is set forth in  
8 Mr. Carnegie's affidavit, when they brought in the two items of  
9 art into the United States --

10 THE COURT: Right.

11 MR. BYLER: -- they did this openly.

12 THE COURT: All right. Do you dispute that, Mr.  
13 Hernandez?

14 MR. HERNANDEZ: We do.

15 THE COURT: So that's a disputed issue of fact that  
16 they did it openly.

17 MR. HERNANDEZ: Well, we -- I think we dispute its  
18 relevance.

19 The fact that Mr. Carnegie advertised that there was  
20 going to be a painting being auctioned is completely separate  
21 from the narrow legal question here, which is, when an item is  
22 misdescribed, misrepresented as it passes through Customs --

23 THE COURT: Right.

24 MR. HERNANDEZ: -- is that item being smuggled or  
25 clandestinely imported. So, I mean there may be a dispute, but

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1 it's not a material dispute about the narrow issue for the  
2 remand.

3 And I also think that it would be wise to cabin it  
4 just to what the issue on the remand is. All the other facts  
5 that the Court of Appeals found are satisfactory and meet the  
6 materiality requirement, for example, those are not in dispute.  
7 Those are not open to further debate. The law of the case  
8 settles that.

9 So I don't think there's a factual dispute with  
10 respect to the fact that it was the Painting and the Togatus  
11 were misrepresented. I think that's clearly been established,  
12 and it's really, frankly, not up for further debate because  
13 it's already been resolved by the Circuit.

14 The question is, when you have a painting that's  
15 misrepresented grossly as to its value, not identified by its  
16 name or by its famous artist, when that passes through Customs,  
17 is it being smuggled or clandestinely introduced? So I think  
18 that it's a narrow legal question that can be resolved on the  
19 current briefing, but I mean I understand Mr. Byler wants to  
20 maybe re-present the argument.

21 THE COURT: All right.

22 MR. BYLER: May I add, your Honor, that argument was  
23 presented to the Second Circuit that it was a narrow legal  
24 issue. Second Circuit obviously did not feel comfortable in  
25 concluding that.

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1 THE COURT: Well, let's just remember what the Second  
2 Circuit said, which is, "Because we are unable to assess on the  
3 record before us whether the district court found that the  
4 Defendants-In-Rem were 'stolen, smuggled or clandestinely  
5 imported or introduced' as required under 19 U.S.C. Section  
6 1595(a)(c), we remand the case to the district court pursuant  
7 to the procedures set forth in United States versus Jacobsen  
8 for clarification of its decision and for additional findings  
9 of fact or conclusion of law as necessary."

10 So I don't think anybody should read too much into  
11 what they said. I think they're basically saying if I think  
12 the current record is good enough, then I just should need to  
13 be explicit that that's what I think, and then I guess they'll  
14 take another bite at the apple, if there's an appeal. Or if I  
15 think there needs to be additional facts and those facts have  
16 to be resolved by a fact finder because they're disputed, then  
17 I guess we'll see.

18 Mr. Lilly, do you have a dog in this fight at this  
19 point?

20 MR. LILLY: Your Honor, our position is that the art  
21 works were clandestinely brought in for the reasons that have  
22 already been expressed here. And from the Trustee's point of  
23 view, since the Trustee believes that the art works were  
24 acquired with funds that were illicitly taken from Banco  
25 Santos, that's another element. It may not reach the narrow

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1 grounds that are reflected in the statute, but it's another  
2 element to the culpability and the smug -- the clandestineness  
3 of the importation of the art works, your Honor.

4 THE COURT: All right. So do you want to be -- do you  
5 want an opportunity to make a submission as well?

6 MR. LILLY: Sure. Yes, your Honor.

7 THE COURT: All right, so let's then talk about  
8 timing. I think it's only fair to allow Mr. Byler and any  
9 other party who wants to make a submission, to make a  
10 submission. So let's talk about timing and the order of  
11 submissions. We can do them all at the same time or we can do  
12 them -- I guess it's the Government's summary judgment motion,  
13 so I guess the government would go first and then Mr. Byler.  
14 And I'm not sure are we'd have you go, Mr. Lilly, at the same  
15 time. Maybe after the whole thing?

16 MR. LILLY: Well --

17 THE COURT: Have you guys thought about this or  
18 discussed it amongst yourselves?

19 MR. BYLER: Well, we did have a brief discussion. And  
20 what we said today in court is pretty much what we said to each  
21 other on the phone. We didn't consider the question of the  
22 Trustee. It sounds like I would want a response to the Trustee  
23 if he takes the position he does, because that's not a summary  
24 judgment.

25 Our position from the start has been what he is

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1 willing to do is not a summary judgment issue. That would have  
2 to be tried. And the Government's case was always very  
3 different in terms of its summary judgment approach. I think  
4 it makes sense, though, for the government to go first so it  
5 can lay out why the government believes there are legal and  
6 factual grounds here on summary judgment, I do underscore the  
7 words on summary judgment, for why 1595 is satisfied, and then  
8 I can respond to it.

9 THE COURT: We're not getting into all of 1595.

10 MR. BYLER: Oh, no, no, no.

11 THE COURT: Just getting into --

12 MR. BYLER: The remand.

13 THE COURT: One phrase.

14 MR. BYLER: Yeah, remand question.

15 THE COURT: Yeah. Okay. So when do you want to make  
16 your submission, Mr. Hernandez?

17 MR. HERNANDEZ: Judge, I think we could have our  
18 submission ready in ten days.

19 THE COURT: Okay, that's fine. 10 days is what?

20 THE DEPUTY CLERK: May 3rd is a Thursday or --

21 THE COURT: Let's say May 4th is a Friday.

22 Okay. And, Mr. Byler, how long do you think you need?

23 MR. BYLER: What day is ten days from now? I'm sorry.

24 THE COURT: May -- well, May 4th is 11 days. Because  
25 it's a Friday, I think it's always easier to just make --

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1 MR. BYLER: Okay. I have a trial starting on  
2 May 14th, that's why I'm calculating in my mind, because being  
3 a trial lawyer and, you know, it's consuming. I don't want to  
4 drag it out. On the other hand, I am a little concerned about  
5 meeting May 14th. I don't mind giving the government a  
6 little --

7 THE COURT: I'd give you more time then if you need  
8 it. How much time do you think you need?

9 MR. BYLER: May 21st. Is that okay?

10 THE COURT: That's fine. I can give you more than  
11 that if you want. I would have thought 30 days.

12 MR. BYLER: 30 days I would appreciate, please.

13 THE COURT: I mean, there's no -- I mean, everybody  
14 wants to get this resolved.

15 MR. BYLER: Oh, I understand.

16 THE COURT: Myself included. But there's no prejudice  
17 that's flows making this 14 days or 30 days, right?

18 MR. BYLER: No. I would appreciate the 30 days in all  
19 honesty because I, in addition to the trial, I have post trial  
20 papers to file in another case, so that's before the trial.

21 THE COURT: So June 3rd? June 4th is a Monday, okay,  
22 so.

23 MR. BYLER: Thank you very very much, your Honor.

24 THE COURT: You don't have to thank me. That's fine.  
25 So defendants by June 4th. And then why don't we have -- if

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1 you're going to do something, when do you think you want to do  
2 it, Mr. Lilly?

3 MR. LILLY: I'd like to see what the government says,  
4 but certainly I could --

5 THE COURT: Would you want to wait after the reply  
6 brief, then weigh in or --

7 MR. LILLY: No, no, not after the reply brief, just --  
8 after the primary brief of the government, I could turn it in  
9 the same time as.

10 THE COURT: June 4th.

11 MR. LILLY: June 4th.

12 THE COURT: All right. Then we'll have I guess the  
13 Government's reply, and I'll allow the defendants to make a  
14 reply then after that as well to the defendant would be  
15 making -- not the defendant, Defendant-In-Rem, I guess the  
16 claimant, Broadening would be making a reply just to Mr.  
17 Lilly's.

18 MR. BYLER: Yes. Thank you, your Honor.

19 THE COURT: Okay, so that'll be ten days after that,  
20 all right. But then you got a little bit of daylight --

21 MR. BYLER: Yes, yes.

22 THE COURT: -- Mr. Byler, so.

23 MR. BYLER: Thank you.

24 THE COURT: All right. So June 15th is a Friday then,  
25 okay, and I'll memorialize this, I'll put it on -- I'll docket

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1 it, but government by May 4th, defense and the Trustee by --  
2 Trustee, right, by June 4th. Then replies from the government  
3 to Mr. Byler's submission and Mr. Byler to the Trustee's  
4 submission by June 15th, okay.

5 And I guess, Mr. Hernandez, you can also respond to  
6 the Trustee's submission at the same time, make it one brief.  
7 Okay, see where we are.

8 Let's schedule this for an oral argument too, just so  
9 we have it down. It may be that I don't need one, but I think  
10 it's better to schedule it. And do you know what your summer  
11 plans are like, you folks?

12 MR. BYLER: I'm a little tight in June, but July does  
13 open up, thank God.

14 THE COURT: Would mid-July be all right? You think if  
15 I schedule this, an oral argument in mid-July, would that be  
16 all right?

17 MR. BYLER: Yes, absolutely.

18 THE COURT: Mr. Hernandez.

19 MR. HERNANDEZ: I have a trial on July 23rd, so if we  
20 could just give me a little bit of buffer on the earlier part  
21 of June -- July, rather, that would be great.

22 THE COURT: Okay.

23 MR. BYLER: That's fine with me.

24 MR. LILLY: That's fine. Early is fine with me.

25 THE COURT: How about 11:30 on Friday, July 13th,

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1 unless you're superstitious?

2 MR. HERNANDEZ: It cuts both ways.

3 THE COURT: July 13th at 11:30, okay. And as I said,  
4 I'll issue an order that memorializes these dates, and  
5 hopefully then we can wrap this up.

6 Anything else we should cover today?

7 MR. HERNANDEZ: No, your Honor.

8 MR. BYLER: No, your Honor.

9 THE COURT: No all right.

10 MR. BYLER: Thank you very much.

11 MR. LILLY: Thank you, your Honor.

12 THE COURT: Good to see you again. I guess, I mean  
13 it's not ideal to have it go up and come back down, but we'll  
14 fix it.

15 Okay let me thank the Court Reporter. If you need a  
16 copy of the transcript, you can take that up with the Court  
17 Reporter now.

18 (Adjourned to July 13, 2012 at 11:30 a.m.)  
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